REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 185 OF 2013

JOSHUA MAKAU KITAVI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Judgement, sentence and conviction in Criminal case number 1768 of 2012, R vs Joshua Makau Kitavi & Jeremiah Muli Mutunga alias Paul at Machakos, delivered by Hon. P. N. Gesora, S.P.M., delivered on 14.8.2013).

JUDGMENT

Introduction.

1. The principles to be kept in mind by a first appellate court while dealing with appeals are:-[1]

> a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
>
> b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
>
> c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
>
> d. When the trial Court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.

2. The duty of a first appellate court was also authoritatively summarized by the Supreme Court of India in the case of *K. Anbazhagan vs. State of Karnataka and Others*,[2] as follows:-

> "The appellate Court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,...The appellate Court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – **sans passion and sans prejudice**. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

Background to the appeal.

3. Joseph Makau Kitavi (hereinafter referred to as the appellant) was charged with the offence Robbery with violence contrary to section **295** as read with section **296 (2)** of the Penal Code[3] at the Chief Magistrates Court at Machakos jointly with a one **Jeremiah Muli Mutunga** alias **Paul**. It was alleged that on the night of **25th** and **26th** December 2012, at Africa Brotherhood Church, Kyumbi, within Machakos County, jointly, while armed with offensive weapons, namely a panga and an iron bar, robbed **Reverend Joseph Mangi Kioko** of a Kiswahili Bible, a Nokia mobile phone of un known value and details and cash **Ksh. 1,500/=** and after the said robbery killed the said **Reverend Joseph Maingi Kioko**.

4. **PW1 Onesmus Mutuku Mutua** testified that on **26th** December 2012 the appellant, a guard at ABC Kyumvi told him that robbers had invaded the church and that he had not seen the Pastor. He testified that the appellant led him to the church and showed him broken padlock and inner doors, but nothing had been stolen. He testified that the appellant led him to a separate room where the pastor was sleeping about 20 meters from the church, and, that, its door was closed. He stated that he proceeded to the window, pulled the curtain and saw the pastor lay there, and the household goods were scattered on the floor. He also testified that they notified the police, who came to the scene, and, that he noted that the deceased had been cut thrice on the head. He further testified that they went round the house and found the appellant holding a panga and a stick. He also stated that upon searching, they noted that the deceased's money, bible and mobile phone were missing. He testified that the elders had given the deceased **Ksh. 1,500/=** to use as bus fare. He identified a blanket, panga, bible and whip in Court.

5. Upon cross-examination by the appellant he confirmed that:it was the appellant who reported the attack, and, that he never inspected the panga to confirm whether it had blood stains, and, that the appellant accompanied him to the scene and telephoned other elders. Also, he stated that when the police came the appellant was carrying his panga. He also stated that the appellant was suspected because he was the night guard.

6. PW2, **Patrick Mutuku Mutua** testified that by the time he arrived at the scene the police had already arrived and they could not access the pastor's house. He identified the panga and the whip as the ones the appellant was using. Upon cross-examination, he stated that he saw the appellant at the scene and that his panga had no blood stains.

7. PW3, No. 231114 **CI Lawrence Wahime,** a Chief Inspector of police testified that he recorded the appellant's confession which he made voluntarily and confessed to having committed the offence in the presence of the appellant's wife and that the appellant affixed his thumb print.

8. PW4's evidence was that he was with the second accused on **25th** December 2012 until 9pm. **PW5,** a bar attendant confirmed having served two customers, among them the second accused.

9. PW6 233636 IP Jones Bore was the investigating officer. He testified that he visited the scene and noted the entrance to the church had not been broken into. He testified that he suspected the appellant, and upon interrogation, the appellant opened up and stated how he committed the offence, thereupon, he requested PW3 to record the statement. He gathered from the statement that he used a panga which he went and recovered it together with a whip from the scene. He also testified that the appellant also implicated the second accused. He also testified that the appellant showed him a water place where he washed the blood.

10. PW7 Dr Fredrick Okinyi, pathologist who performed the post mortem testified that the cause of death was severe head injury caused by a heavy cutting object. **PW8 No. 76891 PC Kenedy Ambuli** arrested the second accused.

11. At the close of the prosecution case, the learned Magistrate evaluated the evidence and placed the accused persons on their defence.

12. In his defence, the appellant testified on oath that on **25th** December 2012 at around **3pm** he was on duty patrolling the premises when people appeared with torches. He stated they were many, hence, he decided to run away. He stated that he hid in a toilet until **5am** when he noticed that the padlock had been damaged, he flashed the torch into the room and saw the deceased's body and notified **PW1**. He claimed that he was given a paper and asked to sign and that his wife was also asked to sign.

13. On his part, the second accused stated that the police asked him to account for his activities on **25th** December 2012 which he did.

14. After evaluating the above evidence, the trial Magistrate correctly found that the evidence tendered was circumstantial. Citing the Court of Appeal decision in *Sawe vs Republic*[4]he stated that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt and, that, there must be no other co-existing circumstances weakening the chain of circumstances relied on. The learned Magistrate concluded that the appellant's alibi raised more questions than answers, such as, if at all he saw the robbers why didn't he report to the police or raise the alarm even after he realized the robbers had left. The learned Magistrate concluded that the circumstances clearly pointed at the accused and convicted him accordingly and sentenced him to death.

The appeal.

15. Aggrieved by the verdict, the appellant appealed to this Court citing **5** grounds, namely:-

> **a. That** *the learned trial Magistrate erred in law and fact by concluding that the charge had been proved beyond reasonable doubt when the evidence pointing to the appellant's guilt was inadequate.*
>
> **b. That** *the learned Magistrate erred in law by convicting on duplex charge.*
>
> **c. That** *the learned trial Magistrate erred in law and fact by failing to observe that the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established accordingly.*
>
> **d. That** *the learned trial Magistrate erred in law and fact by admitting the confession statement under inquiry which had been obtained contrary to section **25A** of the Evidence Act.**[5]***
>
> **e. That** *in any eventuality that the appeal does not succeed, this Court to review the sentence in light of Section **216** and **329** of the*

16. The appellant filed written submissions. He faulted the learned Magistrate for shifting the burden of prove to him contrary to the law.[9] He also submitted that the charge sheet was defective, that it was duplex and the ingredients of an attack using dangerous weapon was not provided to qualify the charge to be one of aggravated robbery with violence. He argued that the weapons named in the charge sheet were not described as dangerous as required under sections **134** and **137** of the Criminal Procedure Code.[10] He argued that the charge was framed under section **295** as read with **296 (2)** as opposed to only under section **296 (2)** which spells out the ingredients of the offence of robbery with violence. He cited *Joseph Njuguna & Others vs Republic**[11]***and *Simon Muniaru vs Republic**[12]*** whereby it was held that it would not be correct to frame a charge for the offence of robbery with violence under section **295** and **296 (2)** as this would amount to a duplex charge, hence, the offence of robbery with violence ought to be charged under section **296 (2).**[13]

17. On circumstantial evidence, he argued that the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, that the circumstances should be of a definite tendency unerringly pointing towards guilt of the accused, and, that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else.[14]Further, he argued that it is also necessary before drawing the inference of accused guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.[15]

18. He also submitted that the Magistrate erred in relying on the confession. However, I have carefully studied the judgement. It is clear that the learned Magistrate did not base his findings on the alleged confession but premised his findings on circumstantial evidence. Accordingly this ground fails.

19. The appellant further submitted that in the event the appeal does not succeed, the court considers ground 5.

The Respondent conceded to the appeal.

20. The appeal is not opposed. The Respondent's counsel submitted that the case rested purely on circumstantial evidence which does not meet the tests laid down in *Michael Muriuki Munyori*[16]citing *Abanga alias Onyango vs Republic*.[17]He submitted that the appellant's arrest was purely based on mere suspicion.

Determination.

21. I find it useful to cite the High Court of Bloemfontein, South Africa in *S vs Singh**[18]*** where the Court stated:-

> "The best indication that a Court has applied its mind in the proper manner …is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses."

22. When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. As Nugent J (as he then was) in *S vs Van der Meyden**[19]***stated:-

> "What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

23. This Court must determine, as regards the conviction in the first place, what the evidence of the state witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial Court in relation to that evidence, and then determine whether the trial Court applied the law or applicable legal principles correctly to the said facts in coming to its decisions / findings or judgment.

24. In other words, this Court must consider whether the Magistrate considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at his judgment in respect of both the conviction and sentence. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence.

25. Stated differently, in order to determine whether there is any merit in any of the submissions made by the respective parties mentioned above, this Court must consider the evidence led in the trial Court, juxtapose it against the judgment by the trial Court, and finally determine whether there is any basis for interfering with the said judgment.

26. This means that if an appellate Court is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial Court. The appeal Court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirection, is so material as to affect the judgment, in the sense that it justifies interference by the Court of appeal.

27. To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational

inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the Court to find the defendant not guilty.

28. The key question that this Court seeks to answer is whether or not the prosecution evidence established the offence to the required standard and also whether the appellant offered any other explanation that could exonerate him from the offence or whether there exists any other co-existing circumstances which could weaken or destroy the inference of guilt which is a necessary test before arriving at a conviction on the evidence tendered. The learned Magistrate based the conviction on what he correctly described as circumstantial evidence.

29. The evidence used to prove guilt is classified as either direct or circumstantial. Direct evidence, testimony presented, is a statement about a fact constituting a disputed material proposition of a rule of law, while circumstantial evidence is testimony about a fact or facts from which the disputed material proposition may be inferred.[20]

30. Thus, circumstantial evidence can be defined as relying on certain proved or provable circumstances from which a conclusion can be drawn that it was the accused person who committed the offence.[21] It is evidence of circumstances which can be relied upon not as proving a fact directly but instead as pointing to its existence. It differs from direct evidence, which tends to prove a fact directly, typically when a witness testifies about something which that witness personally saw, or heard.

31. Both direct and circumstantial evidence are to be considered, but to bring a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the Court to find the defendant not guilty. This follows from the requirement that guilt must be established.

32. Commonly, three special directions are given in substantially circumstantial cases:-

i. as to drawing inferences;**[22]**
ii. that "guilt should not only be a rational inference but should be the only rational inference that could be drawn from the circumstances"**[23]**
iii. that if there is any reasonable hypothesis consistent with innocence, the court's duty is to acquit.**[24]**

33. The second and third directions stated above are but different ways of conveying, or emphasising the meaning of *"beyond reasonable doubt."* Although a conviction will not be upset merely because the evidence is wholly circumstantial, a more rigorous test is generally used to determine whether such evidence is sufficient to convict.

34. In *Abanga alias Onyango vs. Republic*, the Court of Appeal stated the principles which should be applied in order to test circumstantial evidence as follows:-

> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests **(i)** the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, **(ii)** those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; **(iii)** the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else"

35. A similar position was held *GMI vs. Republic*[25]**.** These are:-

> i. The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> ii. Those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

36. In order to ascertain whether or not the exculpatory facts put forward by the prosecution are incompatible with the innocence of the appellant and incapable of explanation upon any other reasonable hypothesis than that of guilt, we must also consider a further principle set out in the case of *Musoke v. R*[26]citing with approval *Teper v. R*[27], thus:-

> "It is also necessary before drawing the inference of accused's guilt from *circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference"*

37. In *Sawe vs Republic***[28]** the court followed the above principles and added that *"suspicion however strong cannot provide the basis of inferring guilt which must be proved beyond reasonable doubt."*

38. The learned Magistrate correctly laid down the law on circumstantial evidence but grossly erred when he proceeded to make conclusions not founded on the evidence before him but mere suspicion. The learned Magistrate descended into the arena of giving evidence when he stated:-

> "Accused 1 was alone when the deceased arrived in the Church compound. He continued guarding the premises but by morning the

pastor had been killed. The explanation that the robbers struck and he hid in the toilet from 3.00am to 5.00 leaves more questions than answers. If it is true that he ran away because the gang was of many people, one wonders when he saw them and decided to run away without them seeing him. It would also appear that the gang never pursued him and he could have easily gained his freedom and raise alarm or even go to the police station to make a report. He did none of these.

At the scene of attack it would appear that the attacker had ample time to attack, rob and kill the deceased and lay his body on the bed, cover it with a blanket and lock his room. The acts herein were of a person who knew the surroundings well and took his sweet time to do it. An outsider would not have taken his sweet time for fear of being caught as the night guard has escaped and was likely to report the matter.

Accused 1's conduct after the incident also raises questions. He opted to go to PW1's home to report the incidence. Once again he never raised alarm when he realized that the alleged attackers had left. It is my considered view that there were no such attackers and he was the one who attacked the pastor.

My position is further fortified by the fact that the deceased was about to travel to his rural home and being a festive season, he had money. This was the motive behind the attack. Accused 1 tried to cover up the matter and his involvement by going and reporting the same to PW1." (Emphasis added).

39. The leaned Magistrate in the above passage is adducing evidence and making conclusions including inventing the motive for the offence. The above details are not part of the prosecution evidence. In my view, the trial Court did not give due weight and consideration to the probabilities or improbabilities inherent in the circumstances of this case. Even in expressing the view cited above which went against the evidence adduced by the prosecution witnesses, the Magistrate only mentioned his conclusions which were based on totally erroneous basis and contrary to the evidence. The best indication that a Court has applied its mind in the proper manner is to be found in its reasons for judgment. The reasoning of the Magistrate certainly reveals that the Magistrate did not apply his mind properly to the evidence adduced before him and but proceeded to make conclusions which went against the evidence adduced by the prosecution.

40. Further, the circumstantial evidence relied upon by the Magistrate did not meet the threshold laid down in the above authorities. It does not irresistibly point towards the guilt of the appellant. There was no reasonable basis for arriving at the conviction. The evidence tendered against the appellant was manifestly weak and did not establish his guilt to the required standard. Such a conviction cannot be allowed to stand.

41. It is also important to mention that the learned Magistrate did not base his conclusions on the alleged confession. Accordingly, I find no reason to address ground four of the appeal.

42. The defence offered by the appellant raises doubts as to his guilty. The defence is reasonable in the circumstances and credible. In my view, whatever is thought to be the purpose of criminal punishment, one fundamental principle seems to have evolved in the jurisprudence of the common law legal tradition; that, before an accused person can be convicted of a crime, his/her guilt must be proved beyond reasonable doubt.

43. The Supreme Court of Nigeria in the case of *Ozaki and another vs The State*[29]stated that for a defence to be rejected it must be incredible and that the defence must be weighed against the evidence offered by the prosecution. In *Uganda vs. Sebyala& Others*,[30] the learned Judge citing relevant precedents had this to say:-

"The accused does not have to establish that his alibi is reasonably true. All he has to do is to create doubt as to the strength of the case for the prosecution. When the prosecution case is thin an alibi which is not particularly strong may very well raise doubts"

44. The accused has only what is referred to as the evidential burden which means the duty of adducing evidence or raising the defence of alibi.[31] Once an accused person discharges the evidential burden of adducing evidence of alibi, it's the duty of the prosecution to disprove it. The duty of the Court is to test the evidence of alibi against the issue adduced by the prosecution and if there is doubt in the mind of the court the same is resolved in favour of the accused.

45. The onus on the prosecution to prove the charge against the accused beyond reasonable doubt never shifts and there is no onus on the accused to prove the alibi beyond that of introducing the evidence of alibi. A trial Court has a duty to weigh the evidence adduced in Court by all the parties in totality and make a finding on the culpability or otherwise of the accused. Choosing to analyse the prosecution evidence and leave out that of the accused is a fatal mistake. It's a duty bestowed in every Court to weigh one set of evidence (prosecution) against another (defence) before arriving at a conclusion. This is the basic calling of every Court without exception.[32]

46. It was improper for the Magistrate to dismiss the defence offered by the appellant in the manner highlighted above including making conclusions not founded on the evidence and basing the conviction on weak circumstantial evidence which did not irresistibly point to the guilty of the appellant. In fact there was no basis for so finding considering the totality of the evidence on record.The South African case of *Ricky Gandavs The State*[33]provides useful guidance. In the said case it was held:-

"The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true…the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses….it is acceptable in totality in evaluating the evidence to consider the inherent probabilities….

The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are

indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt"

47. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the Court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.[34]This is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right.

48. I find that there were reasonable grounds for creating reasonable doubts as to the guilty of the accused. The conviction was unsupported by evidence and went against the weight of the evidence. Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a Court must consider circumstantial testimony with great care, especially when it is the only evidence because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the Court beyond a reasonable doubt that all the elements of the charged crime have been proven and that the evidence irresistibly points to the accused and that the evidence is both truthful and accurate.

49. The upshot is that this appeal succeeds. Consequently, I hereby quash the conviction, set aside the sentence and order that the appellant **Joshua Makau Kitavi** be released forthwith unless otherwise lawfully held.

Orders accordingly.

Signed and Dated at Machakos this day, 2018

John M. Mativo

Judge

Signed, Dated and Delivered at Machakos this 15th day October 2018

G. V. Odunga

Judge

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[1] See *Ganpat vs. State of Haryana* {2010} 12 SCC 59.

[2] Criminal Appeal No. 637 of 2015.

[3] Cap 63, Laws of Kenya

[4] Criminal Appeal No. 2 of 2002.

[5] Cap 80, Laws of Kenya.

[6] Cap 75, Laws of Kenya.

[7] Pet No. 15 of 2015.

[8] {2016} eKLR.

[9] Citing *Woolmington vs. DPP* {1935} A.C 462 at page 481, & Brennan J Re Winship, 397 US 358 {1970}, at pages 361-64.

[10] Cap 75, Laws of Kenya.

[11] {2013}eKLR.

[12] {2013}eKLR.

[13] Citing *Joseph Onyango Owuor* & *Cliff Ochieng Oduor vs Republic* {2010}eKLR.

[14] Citing *GMA vs Republic* {2013} eKLR and *Republic vs Kipkering Arap Koske & Another* 16 EACA 135.

[15] Citing *Musoke vs Republic* {1958} EA 715.

[16] {2014}e KLR.

[17] CR Appeal No. 32 of 1990 (UR).

[18] {1975} (1) SA 227 (N) at 228.

[19] {1999} (1) SACR 447 (W) stated at 450.

[20] Michael & Adler, The Trial of an Issue of Fact: 1, 34 colum. L. Rev 1224, at 1274 (1934).

[21] Criminal Appeal No. 122 of 2003, Court of Appeal Nairobi.

[22] See Jones {1993} 1 QD 676at 680; JRS Forbes, *Evidence Law in England*, 3rd Edition {1999}.

[23] Shepherd {1990} 170 CLR 573 at 578.

[24] Supra note 10.

[25] {2013} eKLR.

[26] {1958} EA 715.

[27] {1952} AL 480.

[28] {2003} KLR 354.

[29] Case No. 130 of 1988.

[30]{1969} EA 204.

[31] See *OrteseYanor& Others vs The State* {1965} N.M.L.R. 337.

[32] *John Matiko & Another vs Republic*, Criminal Appeal No. 218 of 2012.

[33] {2012}ZAFSHC 59, Free State High Court, Bloemfontein.

[34]Duhaime, Lloyd, Legal Definition of Balance of Probabilities, Duhaime's Criminal Law Dictionary.